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Supreme Court of the United States

October Term, 1957

No. 800

In the Matter of the

Petition of SKIBS A/S JOLUND, in a cause of exoneration from or limitation of liability for damages arising out of a fire on board the BLACK GULL on July 18, 1952.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner,

vs.

AMERICAN SMELTING & REFINING COMPANY, *et al.*,
Respondents.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner,

vs.

MARIA ANGELINA VERBEECK, *et al.*,
Respondents.

No. 815

In the Matter of the
Petition of SKIBS A/S JOLUND, as owner of the M/S BLACK GULL for exoneration from or limitation of liability.

SKIBS A/S JOLUND,
Petitioner,

vs.

AMERICAN SMELTING & REFINING COMPANY, ATKINSON HASEBRICK & CO., *et al.*,
Respondents,

MARIA VERBEECK, *et al.*,
Respondents.

MOTION AND BRIEF OF NORGES REDERFORBUND (THE NORWEGIAN SHIPOWNERS' ASSOCIATION) FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

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MOTION OF NORGES REDERFORBUND (THE NORWEGIAN SHIPOWNERS' ASSOCIATION) FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Norges Rederforbund (Norwegian Shipowners' Association) hereby respectfully moves for leave to file a brief *amicus curiae* in support of the petitions for certiorari in these cases, limited to the question of the interpretation of the Fire Statute and the fire exemption clause of the Carriage of Goods by Sea Act. So limited, this motion concerns only the petitioners and respondents, American Smelting & Refining Company, et al., the cargo claimants below. The petitioners have consented to this motion. The said respondents have failed to consent.

Norges Rederforbund is an association of 395 shipowners, constituting almost all of the Norwegian shipowners trading in foreign commerce, whose vessels total 13½ million deadweight tons. Much of the trade carried on by members of the Association is with the United States. For example, in the year 1957 there were 1,366 arrivals of Norwegian flag vessels at the Port of New York, 353 at San Francisco, 444 at Los Angeles, 811 at Hampton Roads, 729 at Baltimore, 147 at Seattle, 538 at New Orleans, and 447 at San Pedro. In all, Norwegian vessels in 1957 made well in excess of 5,000 calls to United States ports.

Article IV 2(b) of the Brussels Convention of 1924, commonly called "The Hague Rules", is identical to the fire exemption contained in Section 4(2)(b) of the United States Carriage of Goods by Sea Act. Norway has adhered to this Convention and, by Act of February 4, 1938, effective January 1, 1939, enacted the Convention as a part of its Navigation Law.

The members of this Association also maintain extensive trade with Belgium, Denmark, Finland, France, Great Britain, Italy, Portugal, Spain, and Sweden, all of which have also made the Brussels Convention part of their private law.

The interest of the moving party in these cases is, therefore, twofold:

1. To arrive at a uniform interpretation of the fire exemption, so that the obligation of its members to cargo owners may be certain and definite; and

2. In particular, to protect its members from the extraordinary burden which, perhaps inadvertently, the unprecedented decision of Court below imposed upon the carrier and shipowner in these cases.

Petitioners, being only a single shipowner and a single charterer respectively, may not be in a position to present adequately to this Court the importance of this question to the entire shipping industry and to the members of this Association in particular.

Respectfully submitted,

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BRIEF FOR NORGES REDERFORBUND (THE NORWEGIAN SHIPOWNERS' ASSOCIATION) IN SUPPORT OF PETITIONS

The facts and questions presented have been stated by the two petitioners and need not be repeated here.

We urge that the decision below be reviewed because it substantially weakens, and casts doubt upon, the protection uniformly afforded to carriers by all major maritime nations, as well as others, against liability for fire damage to cargo by their adoption of "The Hague Rules" (International Convention for the Unification of Certain Rules Relating to Ocean Bills of Lading, signed at Brussels August 25, 1924, 51 Stat. 233), made part of United States Law by enactment of The Carriage of Goods by Sea Act, 1936 (49 Stat. 1207-1213, 46 U. S. C. Secs. 1300-1315), commonly and hereinafter referred to as "COGSA".

Although we consider the Court of Appeals' decision wrong, we shall here emphasize the considerations which demonstrate the importance, both here and abroad, of the questions presented, and make it particularly appropriate for this Court to exercise its discretionary review jurisdiction.

It is inevitable that our Courts' treatment of the COGSA fire exception [49 Stat. 1210, 46 U. S. C. 1304(2)(b)] in this case will have an impact, virtually worldwide in scope. The Act itself is applicable by its own force to bill of lading contracts for the carriage of goods by sea "to or from" United States ports, in foreign trade (49 Stat. 1207, 1212, 46 U. S. C. Sec. 1300, 1312). Thus, in litigation abroad arising out of trade with the United States, courts of other countries may be expected to apply, or endeavor to apply, the COGSA fire exception in the same manner as American courts; indeed, they have done so in the past. *The Ocean Liberty*, Rep. of France, Tribunal de Commerce de la Seine (1st Div., Paris), 1952 A. M. C. 925, 932-933.

In addition, it is significant that COGSA expresses the United State's adherence to the above-mentioned Brussels Convention of 1924, the purpose of which was to develop internationally uniform rules governing the relations of

ocean carriers and their cargo. *Scarburgh* v. *Compania Sud. Americana De Vapores*, 2 Cir., 1949, 174 F. 2d 423, 424; *Knauth on Ocean Bills of Lading*, 1953 Ed., pp. 118-132, 136. This purpose has now in large measure been achieved by virtue of all major maritime nations having made The Hague Rules part of their private law either by ratification, proclamation or enactment of domestic legislation. A list of these countries, besides Great Britain, was recently published in *Carver's Carriage of Goods by Sea*, 10th Ed. 1957, Appendix 5, p. 1072. Japan has since ratified the Convention, effective January 1, 1958 (1957 A. M. C. 1698). In addition, shipowners of other countries have themselves voluntarily incorporated the Rules in their bills of lading, with result that the Rules have been aptly described as constituting a sort of "international common law" for carriage of goods under bills of lading. Dor, *Bill of Lading Clauses & The International Convention of Brussels, 1924 (Hague Rules)*, 1956, p. 147. Indeed, even in the private carriage of bulk cargoes under charter these Rules are important, it now being common for the parties to make COGSA or the Rules themselves part of their contract. See, *e.g.*, the recent decision of the House of Lords in *Adamastos Shipping Co., Ltd.* v. *Anglo Saxon Petroleum Co., Ltd.* [1958] App. Cas.—(not yet officially reported); London Times, March 7, 1958, p. 15.

Besides these international aspects, an equally important reason for this Court's reviewing now the questions here presented is the economic one suggested by this Court's recognition in *Consumer's Import Co.* v. *Kabushiki Kaisha*, 320 U. S. 249, 254-256 (1943), that the statutory immunity of carriers from liability for fire damage is necessarily reflected in the freight rates they charge. Similarly, such immunity is an important factor in the determination of the rates charged by underwriters for insuring cargo as well as in the determination of the rates charged by those underwriters who insure carrier liability. Any whittling down of the carrier's fire immunity

is therefore bound to be of economic importance to all interests concerned, whether on the cargo or the carrier side, and uncertainty alone as to the extent of the carrier's immunity is enough to make maintenance of a proper freight or insurance rate structure impossible.

Although the major error below lay in misplacing the burden of proof this was error in matter of substance, not mere procedure. The whereabouts of the burden of proof and rules as to what must be proved by the burdened party in order to succeed seriously affect, and often determine, the outcome. *Sampson* v. *Channell*, 1 Cir., 110 F. 2d 754, cert. den. 310 U. S. 650. This is inevitably true in cases involving shipboard fires and their causes, since, as succinctly pointed out in *The Strathdon*, 2 Cir., 101 Fed. 600, 606, "the occult causes of fire are as numerous as they are mysterious."

Nor is it any answer to the present applications that the District Court conceivably may yet find in this case that there was no negligence or that, if there was, it was not the proximate cause of the fire. Such an outcome cannot remove the doubt cast by the Court of Appeals' decision on the long line of cases holding that in order to avoid the fire exception cargo must affirmatively prove the cause of the fire and that it was due to the negligence of a managing agent of the carrier. The cases are cited in Black Diamond's petition, p. 13 and in Skibs A/S Jolund's petition, p. 11. In substance, notwithstanding a District Court decision in the carrier's favor in this particular case, uncertainty and a lack of definitive guidance will continue to prevail until this Court settles the questions here presented, once and for all.

Finally, the decision below is contrary to this Court's decision in *Commercial Molasses Corporation* v. *New York Barge Corporation*, 314 U. S. 104. There the District Court held that the cause of the accident had been left in doubt but decreed recovery. The Court of Appeals and this Court

both held that with the evidence in balance the libellant must fail. In the case at bar the District Court found:

> 36. Even if it be assumed that failure to cover the stow of bag naphthalene with a tarpaulin was either negligence or in violation of controlling statute or regulation, *libelants have not proved that that failure was the proximate cause of the fire* (italics ours).

This is a stronger finding for petitioners than the "in doubt" finding in *Commercial Molasses*. Therefore, in reversing the decision despite such a finding the Court of Appeals has, in effect, overruled this Court's *Commercial Molasses* decision.

CONCLUSION

For the foregoing reasons it is respectfully submitted that these petitions for writs of certiorari should be granted.

Dated: New York, New York, March 15, 1958.

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Certificate of Service

I, EUGENE UNDERWOOD, counsel for Norges Rederforbund (The Norwegian Shipowners' Association) certify that on the 14th day of March, 1958, I served a copy of the foregoing motion and brief on the following attorneys by mailing a copy to each of them in duly addressed, first-class, postage prepaid envelopes to their respective addresses noted below, said attorneys representing all the parties to the captioned proceedings:

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